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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1189

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., and DIAMOND TRADING COMPANY, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENT TO BRIEF FOR PETITIONERS

APPENDIX A

STATUTES
OF
THE UNION OF SOUTH AFRICA
1925
WITH
TABLES OF CONTENTS (ALPHABETICAL AND CHRONOLOGICAL) AND TABLES OF LAWS, ETC., REPEALED AND AMENDED BY THESE STATUTES.

PUBLISHED BY AUTHORITY

And Printed under the Superintendence of the Government Printer.

WETTEN
VAN
DE UNIE VAN ZUID-AFRIKA
1925
MET
TABELLEN VAN INHOUD (ALFABETIES EN CHRONOLOGIES GEORDEND) EN TABEL VAN WETTEN, ENZ., DOOR DEZE WETTEN HERROEPEN EN GEWIJZIGD.

GEPUBLICEERD OP LAST

En Gedrukt onder Toezicht van de Gouvernementsdrukker.

CAPE TOWN
1925

ACT No. 39 OF 1925.

[Date of commencement—29th August, 1925.*

ACT

To provide for the control of the sale and export of diamonds, and for the establishment of a diamond control board in the Union.

(*Assented to 27th July, 1925*)

(*Signed by the Governor-General in English.*)

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:—

Limitation of quantity of diamonds to be disposed of by producers.

1. (1) The Governor-General may determine—

(*a*) during the months of June and December in each year the maximum quantity in value of diamonds which during the ensuing period of six calendar months may be disposed of by all or any of the producers of diamonds within the Union;

(*b*) from time to time the quota or percentage in relation to the quantity referred to in paragraph (*a*) which may be disposed of by any such producer, and may vary and amend the same, but any such variation or amendment shall only take effect as from the first day of January next ensuing.

*See Proclamation No. 196 dated 21st August, 1925, published in *Gazette* No. 1501 of 28th August, 1925.

(2) The Minister shall give notice in the *Gazette* of any such determination, variation or amendment and in such notice shall state—

(*a*) where the determination is under paragraph (*a*) of sub-section (1) the maximum quantity in value of diamonds determined and where the determination is applicable only to certain producers the names of such producers;

(*b*) where the determination is under paragraph (*b*) of the sub-section (1) the quota or percentage in relation to the quantity in value determined under paragraph (*a*) of sub-section (1) which each producer may dispose of.

(3) Any producer who, during the period covered by any determination under sub-section (1) sells or disposes of diamonds of a greater quantity in value than the quota or percentage so determined in respect of himself, shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred pounds plus the value of the diamonds unlawfully sold or disposed of: Provided that a *bona fide* pledge of any diamonds by way of security for advances for working expenditure shall not be deemed to be a disposal thereof.

Minimum prices for diamonds.

2. (1) The Governor-General may at any time by written notice to any producer determine the minimum prices at which diamonds or diamonds of any particular class determinable by reference to quality or weight or by the area of production or by any other circumstance may be sold or disposed of by such producer, during the period fixed in such notice which shall not extend for longer than the six calendar months succeeding the date of the notice: Provided that the Governor-General may at any time within such period by like notice vary and amend such minimum prices.

(2) When any minimum price has been fixed and determined in accordance with the provisions of sub-section (1), any producer who contrary to the terms of such notice and during the period fixed thereby sells or disposes of diamonds at a price lower than that so determined, shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred pounds plus the difference in value between the minimum price determined and the price at which the diamonds were sold or disposed of.

Returns to be furnished by producer.

3. (1) The Minister may by written notice call upon any producer to furnish to him within a period of one month after the expiration of every period of six months referred to in sub-section (1) of section *two* of this Act a return showing—

(*a*) the total value of diamonds disposed of by him during the said period;

(*b*) the maximum, minimum and the mean average prices obtained.

(2) Any producer who when so called upon fails to comply with the provisions of this section, or who renders a return which is false in any material particular, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred pounds or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.

Establishment of Union Diamond Board.

4. (1) As from a date to be notified in the *Gazette* the Governor-General may establish a board called "The Union Diamond Board" (hereinafter referred to as "the Board") which shall consist of three members, one of whom shall be designated by the Governor-General as chairman and business manager. The conditions of such appointment

shall be notified forthwith to Parliament, if then in session, or, if not, within seven days after the opening of the session next ensuing.

(2) The rate of remuneration, the period of office and the conditions of appointment of members of the Board shall be fixed by the Governor-General at the time of appointment: Provided that, notwithstanding any period of office or other conditions so fixed, a member may at any time be removed at the discretion of the Governor-General.

(3) The chairman and members of the Board shall be selected for their knowledge and practical experience of the business of buying, selling and dealing in diamonds or of finance or public business.

(4) The members of the Board shall give their whole time to the work of the Board and shall hold no other appointment.

(5) A person shall be disqualified to be appointed or to remain a member of the Board if—

(*a*) within three years prior to his appointment he has been an unrehabilitated insolvent or has within such period compromised with his creditors or has within such period assigned his estate or if his estate is surrendered or sequestrated or if he compromises with his creditors or assigns his estate under the law relating to insolvency;

(*b*) he has been convicted of an offence and sentenced to imprisonment without the option of a fine;

(*c*) he holds directly or indirectly any share or interest in any undertaking for winning or dealing in diamonds or for cutting or polishing diamonds, or if within three months prior to

his appointment he has held directly or indirectly any such share or interest; or

(*d*) being a member of the Board, he engages in remunerative employment outside his duties as such.

(6) The salaries and other remuneration of the members of the Board and all expenditure incurred by it shall be defrayed from the revenues of the Board under this Act.

Board to be a body corporate.

5. The Board shall be a body corporate and shall under the name of the Union Diamond Board be capable in law of suing and being sued, and subject to the provisions of this Act, of purchasing or otherwise acquiring, holding and alienating property, movable or immovable, and of doing and performing all such acts and things as bodies corporate may by law do and perform.

Functions of the Board as to acquisition and disposal of diamonds.

6. (1) It shall be the function and duty of the Board, subject to the provisions of this Act to purchase, sell, deal in and hold stocks of diamonds and to export diamonds from the Union; when required by the Minister to advise him in respect of any determination to be made under section *one* or *two* of this Act or in respect of any other matter connected with the diamond trade; and at any time to furnish the Minister with any information he may require in regard to the business of the Board.

(2) The Board may, subject to the general or particular direction of the Governor-General as to the method and terms of obtaining all or any diamonds from all producers or any producer—

(*a*) purchase diamonds from producers as herein defined and also from any other producers of diamonds whether conducting diamond mining operations within the Union or elsewhere and sell the same, and for that purpose enter into agreements with any person producing diamonds for the purchase of the whole or any portion of his production for such period and at such prices as may be agreed upon;

(*b*) demand and receive diamonds from any producers named by the Board upon the instructions of the Governor-General for export and sale on their behalf; and the Board shall dispose of the diamonds received to the best advantage at its discretion subject to any direction by the Governor-General as to minimum prices, and the producers shall bear the costs of whatever nature in connection with the handling, carriage, freight, export, safe-keeping and sale of such diamonds and shall be liable for all risks attendant upon the handling and disposal thereof and for any remuneration to the Board or its representatives for such disposal on a scale or basis to be fixed by the Governor-General; and

(*c*) receive diamonds from producers as herein defined and also from any other producers of diamonds whether conducting diamond mining operations within the Union or elsewhere for export and sale as agents on their behalf and receive and pay over moneys received by the Board for such sale less commission and agency fees, and any carriage, freight, duty and other expenses incurred, and enter into agreements with any such producers in respect of such export, sale and charges.

(3) Any producer who refuses, or who without lawful cause fails to comply with any demand made by the Board under paragraph (*b*) of sub-section (2) for the delivery to the Board of any diamonds for export and sale on his behalf shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand pounds or at the discretion of the court the value of the diamonds so demanded.

Powers of the Board.

7. For the purpose of the performance of its functions and duties the Board shall, with the authority of the Minister, have the following powers:—

(*a*) To appoint and employ such technical officers, agents, valuators, buyers, salesmen, secretaries, accountant, clerks or other servants as it may deem requisite and to dismiss them;

(*b*) to pay any person in its employ such salary, wages, or other remuneration as it may deem fit;

(*c*) to contribute to or to grant pensions or gratuities to persons in its employ or to dependents of such persons;

(*d*) to acquire by purchase, lease or otherwise, land or buildings for offices, strong rooms, sale rooms, or other accommodation within the Union or elsewhere necessary for the purposes of the Board;

(*e*) subject to the provisions of this Act, to receive, control and invest, and to open and operate banking accounts in respect of all moneys advanced by the Government on the authority of Parliament or received by the Board, its agents, bankers or salesmen, for the sale of diamonds or otherwise, in accordance with this Act, and to pay out moneys for the purchase of diamonds or otherwise from the funds of the Board, in accordance with this Act;

(*f*) to make advances from, or investments of, such moneys of the general fund to be established under section *thirteen* or investments of such moneys of the reserve fund to be established under section *fourteen* as may, in the opinion of the Board, not be required to meet current requirements, and

(*g*) to make advances to producers mentioned in section *six* (*2*) (*b*) at the time of the receipt and against delivery of diamonds to the Board at a rate per carat not exceeding the working costs per carat or not exceeding seventy-five per-cent of the value of the diamonds delivered whichever shall be the lesser but such advances shall only be made if in the opinion of the Minister they are necessary to meet the working expenses of the producer.

New agreements to be executed.

8. Every agreement made by the Board shall be deemed to be duly executed if signed by the chairman or by one or more members of the Board authorized thereto by resolution passed at a meeting of the Board.

Advances of money to the Board.

9. The Minister of Finance may, out of moneys provided by Parliament for the purpose, advance to the Board, on such conditions and at such rate of interest as he may deem fit, such sums as he may deem necessary to enable the Board to carry out its functions under this Act.

Books of account.

10. (1) The Board shall cause to be kept proper books of account which shall show a full and accurate record of all its transactions, assets and liabilities, and shall prepare yearly balance sheets made up to the thirty-first day of December, showing in all the necessary detail, its revenue and expenditure and its assets and liabilities.

(2) The Board shall within two months after the thirty-first day of December in each year transmit to the Minister to be laid before the Governor-General and published in the *Gazette* a statement of accounts showing—

(*a*) the profit and loss account for the preceding year; and

(*b*) such other details in regard to the Board as the Governor-General may require.

Every such statement shall be signed as correct by the chairman and members of the Board and shall be laid before Parliament within seven days after it has been so transmitted, if Parliament be then in session, or if Parliament be not then in session, within seven days after the commencement of its next ensuing session.

(3) In addition to the accounts in this section mentioned, the Board shall render to the Minister from time to time such other accounts, reports and statements as the Minister may require.

Minister's right of access to accounts, etc., of Board.

11. The Minister or any officer of the Public Service deputed by him shall have full access to all the accounts, documents and papers of the Board, and the Board and its officials shall at all times furnish to the Minister or such officer all such information as he may require.

Audit.

12. (1) The Governor-General may appoint two or more persons who publicly carry on the profession of accountants (hereinafter referred to as the auditors) to examine the accounts of the Board. Such examination is hereinafter referred to as the audit. The Board shall produce and lay before the auditors all its books and accounts with all vouchers in support thereof, and all books, papers

and writings in its possession or control relating thereto. The expenses of and incidental to the audit shall be borne and paid by the Board.

(2) For the purposes of the audit any such auditor may hear, receive and examine evidence upon oath (which oath any auditor is hereby empowered to administer) and by summons under his hand require such persons as he may think fit to appear personally before him at a time and place to be stated in the summons and to produce all such books and papers as may be necessary for such audit. Any person so required, who, without lawful excuse, fails to attend in obedience to such summons or who, having appeared, refuses to be examined on oath or to take such oath, or, having taken such oath to answer such questions as may be put to him or gives any false testimony shall be guilty of an offence and liable on conviction to a fine not exceeding twenty pounds: Provided that no conviction under this section shall be construed as exempting the person convicted from liability to do or perform the act, matter or thing required to be done or performed by him or from being successively convicted and punished for every distinct commission of the same offence.

(3) The auditors shall disallow every payment made without due authority according to law and surcharge the same on the person making or authorizing the illegal payment; and shall charge against any person responsible therefor the amount of any deficiency or loss incurred by the negligence or misconduct of that person or of any sum which ought to have been but is not brought into account by that person, and shall in every case certify the amount due from such person. Every sum so certified by the auditors shall be paid by such person to the secretary or other officer appointed by the Board within fourteen days after the same has been so certified and if not so paid may be recovered from such person as a debt by the auditors who shall be paid by the Board such portion of their reasonable

costs and expenses incurred in such proceedings as are not recovered by them from such persons. Any sum so recovered shall be paid to the secretary or other officer appointed by the Board.

(4) It shall be the duty of the auditors in addition to the ordinary duties of auditors, to certify not less than once in every year whether or not—

(*a*) the accounts of the Board are in order;

(*b*) the accounts present a true and correct view of the financial position of the Board and of its transactions and of the results of its trading;

(*c*) due provision has been made for the redemption and repayment of any moneys borrowed by or advanced to the Board;

(*d*) the value of the assets of the Board has been correctly stated;

(*e*) the sums to be set aside annually to the reserve fund under section *fourteen* have been set aside as prescribed; and

(*f*) all their requirements and recommendations as auditors have been complied with and carried out.

General fund.

13. The Board shall establish and maintain at a bank approved by the Minister a general fund into which all moneys received by the Board from whatever source shall in the first instance be paid; and out of which all payments by the Board shall be made, save such payments as are made out of the reserve fund under the authority of section *fourteen*.

Reserve fund.

14. (1) As soon as may be after its appointment the Board shall create a reserve fund to which shall be credited from time to time any nett profit earned by the Board.

(2) The reserve fund shall be applied by the Board in making good any loss or deficiency which may have occurred during any previous period as the result of its transactions.

(3) Whenever any balance remains in the reserve fund, after providing for the loss or deficiency aforesaid, so much of such balance as in the opinion of the Minister of Finance after consultation with the Board is not required to meet any probable contingent loss or deficiency shall be devoted by the Board to the repayment of any advances made to the Board by the Minister of Finance under section *nine*.

(4) If at any time the Minister of Finance, after consultation with the Board, shall be of opinion that the balance or any portion thereof remaining in the reserve fund after payment of such loss or deficiency aforesaid and completion of the repayment of advances made by him under section *nine*, is in excess of all probable demands upon such fund for the ensuing period of twelve months, Parliament may by resolution of both Houses, determine the manner in which such excess shall be disposed of.

Rewards and bribes.

15. (1) If the chairman or any member of the Board or any servant of the Board directly or indirectly receive any fee or reward from any person in respect of or in connection with any business of the Board, or be directly or indirectly interested or concerned in any contract or the profit or benefit of any contract made by the Board, save a contract of the kind referred to in sub-section (2) of section *four* hereof, he shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred

pounds, or imprisonment for a period not exceeding five years or to both such fine and imprisonment.

(2) Any person who in respect of, or in connection with, any business of the Board bribes or attempts to bribe, or corruptly influences, or attempts corruptly to influence the chairman or any member of the Board or any servant of the Board, shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred pounds, or imprisonment for a period not exceeding five years, or to both such fine and imprisonment.

Prohibition of sale, disposal or export of diamonds save through Board.

16. (1) The Governor-General may at any time after the appointment of the Board by notice in the *Gazette* declare a date after which it shall be unlawful for any producer indicated in such notice to sell or dispose of or export diamonds save to or through the agency of the Board and from and after that date so declared the sole and exclusive right of exporting diamonds from the Union shall vest in the Board: Provided that the Board may, subject to regulation, permit the sale, purchase or export of diamonds by any other person than the Board.

(2) After the date aforesaid any person who sells or disposes of diamonds otherwise than as stated in the last preceding sub-section, or attempts so to do, or who exports or attempts to export any diamonds from the Union except under permit from the Board, shall be guilty of an offence and shall be liable to confiscation of all diamonds so sold, disposed of or exported or attempted to be sold, disposed of or exported, and in addition to a fine not exceeding twice the value of the diamonds so sold, disposed of or exported or attempted to be sold, disposed of or exported or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.

When agreements for sale of diamonds must be approved by Minister.

17. (1) The Governor-General may at any time by notice in the *Gazette* or by notice to any producer—

(*a*) declare that from and after a date fixed by him in such notice no agreement, entered into by any producer of diamonds in the Union or by those producers whose names are indicated in the notice, for the sale or disposal of diamonds produced by him or them, shall be valid unless and until approved by the Minister;

(*b*) declare that any agreement entered into prior to such notice and whether before or after the commencement of this Act by any producer of diamonds in the Union or by those producers whose names are indicated in the notice for the sale or disposal of diamonds after the thirty-first day of December, 1925, shall be invalid in respect of diamonds to be sold and delivered after the last-mentioned date unless and until approved by the Minister; and

(*c*) prohibit the export from the Union of diamonds which have not been sold or disposed of under agreement so approved by the Minister.

(2) Any agreement for the sale or disposal of the diamonds produced by any producer entered into upon or after the date fixed in any such notice save in accordance with the terms of this section shall be null and void and any producer or other person entering into such null and void agreement and attempting to act thereon or selling or disposing of diamonds under or in terms of any agreement made invalid by any declaration under sub-section (1) or exporting or attempting to export diamonds in contravention of this section, shall be guilty of an offence and liable

on conviction to a fine not exceeding five hundred pounds plus, in the case of any sale, disposal, export or attempted sale, disposal or export, the value of the diamonds which are the subject of the charge.

Conferences for the purpose of negotiating inter-producers' agreements.

18. (1) Notwithstanding anything in this Act contained, but without prejudice to the powers thereby conferred upon the Governor-General or the Minister, the Minister may from time to time convene conferences of such producers of diamonds as he may deem fit, for the purpose of enabling them to negotiate between themselves agreements (to be known as inter-producers' agreements) relating to all or any of the following matters—

(*a*) the maximum quantity in value of the diamonds produced by them which may be disposed of during any specified period;

(*b*) the quota or percentage of such quantity which may be disposed of by any such producer or any group of such producers during any specified period; and

(*c*) the minimum prices at which diamonds or diamonds of any particular class, determinable by reference to quality or weight or by the area of production or by any other circumstance, may be sold by each such producer or all of them during any specified period.

(2) The Governor-General may approve of any such agreement and may, as a condition of his approval, require—

(*a*) that in the sale of any diamonds the producers shall, other things being equal, give preference to purchasers domiciled in the Union; and

(*b*) that all or any particular sales of diamonds shall be by tender and that the method of inviting and dealing with tenders for the purchase of any diamonds and of ensuring secrecy in relation to such tenders shall be as prescribed by the Minister.

(3) Upon the approval by the Governor-General of any inter-producers' agreement the terms thereof, together with any condition attached thereto by the Governor-General under sub-section (*2*), shall be binding upon the parties thereto, and for the period of such agreement—

(*a*) the provisions thereof shall, in respect of the parties thereto in relation to any matter governed by the agreement, be deemed to be substituted for the corresponding provisions of this Act;

(*b*) the provisions of sections *one*, *two*, *six*, *sixteen* and *seventeen* of this Act shall in respect of the parties to the agreement in relation to any matter governed by the agreement cease to operate; and

(*c*) any party to the agreement contravening any provision thereof shall be guilty of an offence and liable on conviction, if the contravention was a sale or disposal by him of diamonds of a greater quantity in value than the quota or percentage fixed in the agreement in respect of himself, to the penalty prescribed in sub-section (3) of section *one*; if the contravention was a sale or disposal by him of diamonds at a price lower than that determined in the agreement, to the penalty prescribed in sub-section (2) of section *two*; and if the contravention was in respect of any other provision of the agreement, to a fine not exceeding five hundred pounds.

Regulations.

19. The Governor-General may make regulations not inconsistent with this Act—

(*a*) prescribing the conduct of meetings of the Board, and the methods of procedure thereof in the execution of its functions and duties;

(*b*) prescribing the methods of convening conferences under section *eighteen*, the procedure at such conferences, and the period within and manner in which any recommendations or result of any conference shall be conveyed to the Minister;

(*c*) generally for the better carrying out of the objects and purposes of this Act,

and may prescribe penalties for any contravention of or failure to comply with a regulation not exceeding, for a first offence, a fine of fifty pounds, and for a second or subsequent offence, a fine of one hundred and fifty pounds.

Saving as to alluvial diamonds.

20. Nothing contained in this Act shall apply to the sale, disposal or export of alluvial diamonds but the provisions of this section shall not prevent the Board from exercising the powers conferred upon it under paragraphs (*a*) and (*c*) of subsection (*2*) of section *six* of this Act in respect of such diamonds.

Definitions.

21. In this Act unless inconsistent with the context—

"diamond" means rough and uncut or partly cut or partly manufactured diamonds;

"Minister" means the Minister of Mines and Industries or any other Minister to whom the

Governor-General may assign the administration of this Act;

"producer", save in section *eighteen* hereof, means a producer of rough and uncut or partly cut or partly manufactured diamonds to whom a quota of diamonds available for sale is assigned under the provisions of section *one* of this Act.

Short title and commencement.

22. This Act may be cited for all purposes as the Diamond Control Act, 1925, and shall commence and come into operation on a date to be fixed by the Governor-General by proclamation in the *Gazette*.

APPENDIX B

IN THE

District Court of the United States

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff*, v. DE BEERS CONSOLIDATED MINES, LTD., *et al*, *Defendants*.	Civil No. 29-446

MEMORANDUM FOR THE GOVERNMENT IN SUPPORT OF THE APPLICATION FOR A TEMPORARY INJUNCTION

Introductory Statement

On January 29th, the United States filed in this Court, a civil complaint charging nine corporate defendants and certain individuals with engaging in an unlawful combination and conspiracy in violation of the Sherman Antitrust Act and the Wilson Tariff Act, and seeking injunctive relief to prevent the continuation of the illegal practices charged in the complaint. At the same time, this Court signed a restraining order temporarily enjoining the corporate defendants from withdrawing their money from banks, or diamonds or other property from safe deposit boxes, and from withdrawing from the United States or selling or otherwise disposing of property belonging to the corporate defendants pending the determination of the issues of the case.

The Government is now moving for a temporary injunction to replace the temporary restraining order.

The restraining order was twice extended when the present motion was put over to afford the defendants additional time. The restraining order has been modified with the consent of the Government to permit payments for future purchases from defendants so as to facilitate the regular conduct of business by the defendants during pendency of the order.

I. The Complaint

To understand the problems growing out of this motion and the reasons why the Government is seeking this relief at the present time, it is necessary to refer briefly to certain facts alleged in the verified complaint, and the affidavit filed in support of this motion.

All of the corporate defendants are foreign corporations organized under the laws of foreign countries. They are charged with having engaged in a conspiracy restraining foreign commerce in this country in industrial and gem diamonds. As charged in paragraph 31 of the complaint, the combination and conspiracy has consisted of a continuing agreement between the defendants: (a) to prevent dealers and consumers in the United States from purchasing diamonds from the producers, (b) to prevent all sale or purchase of diamonds for export to or import into the United States except by purchase through Diamond Trading Company and except subject to terms and conditions set by defendants, (c) to prevent all persons in the United States other than certain favored brokers, dealers, and cutters from purchasing diamonds from the Diamond Trading Company, (d) to limit the production and supply of diamonds, (e) to limit and restrict the quantity of diamonds imported into the United States, and (f) to fix, stabilize, and enhance the prices at which diamonds are sold in the United States.

Substantially all diamond deposits are found in various parts of Africa. Defendants who would be restrained, under the proposed injunction, are foreign corporations who are in the business of mining diamonds or marketing them and all participate in the illegal arrangements charged in the complaint.

The complaint further alleges that the conspiracy has been carried on principally by having all producers of diamonds sell all their diamonds exclusively through a single selling agency, which is, at the present time, the defendant Diamond Trading Company.

The complaint further alleges that the defendants exercised the monopoly power acquired by the illegal conspiracy in a harsh and oppressive manner. Defendants exact from customers in the United States exorbitant prices on diamonds sold. They have set up a rather peculiar marketing system. The marketing arrangements differ, in the case of gem diamonds, from those of industrial diamonds.

Gem diamonds are customarily sold only four times a year at so-called "sights" held in London. Only a few selected dealers are permitted to attend these sights and the diamonds are sold in so-called series or lots which consist of a group of diamonds arbitrarily selected as to quality and size by the defendants. Each purchaser admitted to the sight must purchase diamonds in such series and they must purchase not less than £20,000 worth at each sight. If a dealer attends such a sight and does not purchase the minimum amount, he is excluded from all further sights. The dealers must pay for al diamonds purchased by them in advance.

Industrial diamonds, on the other hand, are sold in various ways. Some of them are sold at the sights in the same manner as are gem diamonds. Defendants, however, sometimes sell industrial diamonds directly to dealers in the United States on order by mail or cable. As in the case of gems, however, the dealer must pay for the industrial diamonds ordered in this way in advance of delivery. Pur-

chasers who have ordered by mail or cable are not permitted to inspect shipments before accepting delivery, or to refuse to accept shipments or to return them after inspection. Diamond Trading Company requires purchasers to buy unseen, and without warranty or representation, the industrial diamonds or boart shipped, and, having been paid, Diamond Trading Company will not take back the goods or make any adjustment. Diamond Trading Company has included in shipments of material sold as industrial diamonds material which cannot be used for the desired industrial purposes or for any purposes at all. Purchasers have no recourse and have no other source from which to buy. Purchasers are frequently prevented from buying the type of industrial diamonds needed for their or their customers' industrial operations and are permitted to buy only in series selected arbitrarily by Diamond Trading Company.

The complaint further alleges that the United States is the principal market for both gem and industrial diamonds, and that the restraints are imposed for the primary purpose of increasing the price of diamonds sold in or for export or import into the United States, and that the conspiracy has been put into operation and carried out in the United States in various ways set forth in the complaint.

Relief sought is the cancellation of the illegal arrangements, insofar as it affects our commerce and injunctive relief against their renewal.

The complaint therefore discloses an illegal combination directed against citizens of the United States, which charges them exorbitant prices and otherwise deals with them in a harsh and oppressive manner. Because of the monopoly power which the combination has acquired by this illegal arrangement, our people have no alternative except to submit to the exactions of this group to secure industrial diamonds which are now a vital industrial material.

Some of the widespread uses of this material in our industry are listed in the complaint in paragraph 21.

Industrial diamonds are, at the present time, a vital war material. This Government, from time to time, for military reasons, has desired to create a stockpile of industrial diamonds in this country. This Government, as a result of the conspiracy charged in the complaint, can only buy industrial diamonds in such amounts and at such prices as may suit the monopolistic purposes of these defendants. They would not allow this Government to establish a stockpile of industrial diamonds in the United States; the most they would do was to establish such a stockpile in Canada, which could be drawn on only under certain conditions.

II. The Need for the Preliminary Injunction

The complaint seeks relief which is of considerable importance to the people of this country and to the Government directly. The Government believes that unless the preliminary injunction now asked for is granted, this Court will be unable to grant effective relief in the event that the charges established in the complaint are proven to be true at the trial. Consequently, unless the injunction is granted, the defendants will be able to continue their illegal practices, our citizens will continue to be victimized, and the Government will continue to be dependent on and at the mercy of this ruthless monopoly for a vital war and industrial material.

The Government believes, on the allegations of the verified complaint and supporting affidavit, that it is clearly entitled to the injunction prayed for. If the Government after the trial of this case should secure a final judgment directing the defendants to terminate the illegal arrangements set forth in the complaint, both it and this Court will be confronted with the problem of making this decree effective. The only way in which a decree of the type sought in this case could be made effective by this Court would be through contempt proceedings, and contempt proceedings

could be made effective only through sequestration of the defendants' property within this country pursuant to Rule 70.

It seems clear that contempt proceedings would be completely ineffective in the situation presented without assets of defendants in this country. The defendants are foreign corporations; their mining operations are carried out in Africa; they have created a system of marketing diamonds which forces purchasers to go to London to acquire the diamonds; their principal officers reside abroad; the corporate defendants could terminate the authority of their officers who reside in this country. The foreign corporate defendants have little to fear from contempt proceedings and such proceedings will exert little compulsion upon them to comply with the terms of the decree.

The most effective, if not the only, way of securing compliance with any final judgment that may be entered in the case would be by sequestration of the assets of the corporate defendants that may be found in this country pursuant to Rule 70 of the Rules of Civil Procedure. If the Government should be compelled to wait until the final judgment and then attempt to sequester any property of the defendants in order to enforce obedience to the final judgment, it is extremely unlikely that there will be any assets of the foreign corporate defendants to sequester at that time. All of their property in this country consists of bank deposits and diamonds. These assets could be readily removed from the country. The past conduct and activities of the defendants render it extremely likely that they will withdraw their property from this country so as to avoid, if possible, the enforcement of any decree entered against them. Particularly is this course likely since a suit against defendants to enjoin violations of the Sherman Act can be maintained in no courts in the world except the federal courts in this country.

Defendants have taken various steps to evade the jurisdiction of our courts. They require purchasers to come to

London to purchase diamonds and to pay for them in advance; they insist that the stockpile of diamonds for our war effort be placed in Canada in their possession; they do business in the state of New York, but they have not qualified under the laws of that state.

These defendants owe no allegiance to our laws. They have formed a monopoly which gives them fabulous profits. To assume that they will not withdraw completely from this country and that they will voluntarily obey a decree of this Court which would destroy such monopoly, one must be extremely credulous. Any such assumption would be contrary to the facts of life. The Government must be, therefore, in a position to sequester the funds of these defendants to enforce any final judgment that may be entered in this case so as to secure its effective enforcement. Unless the temporary injunction prayed for is granted, it will suffer certain and irreparable harm. At the present time as a result of the restraining order, the Court has power to make its jurisdiction effective against all corporate defendants whose assets are affected. If the temporary injunction is granted that power is retained; if the injunction is refused and the restraining order dissolved, the Court's power is surrendered.

III. The Effect the Injunction Would Have Upon Defendants

The temporary injunction here applied for would in no way interfere with the present methods by which the defendants do business. It would not require any alteration in any of their methods of marketing diamonds. They could continue as they have in the past to sell diamonds abroad and compel purchasers to pay for them in advance.

The funds in this country form only a part of the total assets of the corporate defendants. They are all wealthy corporations and could readily post bond in lieu of the injunction. Moreover, they have readily available security

in the way of industrial diamonds which they could post in lieu of bond. As pointed out, defendants have in Canada a large stockpile of industrial diamonds which has been established to meet the war needs of American industry. The defendants could as readily hold this stockpile in this country. That is where it is to be used. To move that stockpile here would not inconvenience the defendants in the slightest. As a matter of fact, they could so easily thus provide security, any unwillingness on their part to transfer the stockpile, or a portion of it, from Canada to the United States would warrant an inference that they do not intend to comply with any judgment of this Court.

The only effect in practice upon defendants' business that the United States seeks by the present injunction is that defendants, during the litigation, continue their business here exactly as they have in the past, maintaining here the same assets. Any change by defendants in their course of business, now that this suit has been brought, could only be an act to avoid and defeat the jurisdiction of this Court. Therefore, all that the Government asks is that defendants be prevented from deliberately defeating the Court's jurisdiction.

Failure to grant the injunction would cause irreparable damage to the Government. Granting it will do no harm to the defendants. With the equities so balanced, familiar principles require that the injunction issue.

IV. The Authority in Support of the Injunction

A. The Court is authorized by statute to grant the injunction applied for.

Title 28 U. S. C. A., § 41 (23) provides that:

> The district courts shall have original jurisdiction as follows: (23) Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

This statute confers upon the United States District Courts the general powers of courts of equity, exerciseable in those suits in equity which the District Courts are authorized to entertain. The effect of the statute in this respect is thus described in *Crosley Corporation* v. *Hazeltine Corporation*, 122 F. 2d 927 (C. C. A. 3, 1941) as follows:

> . . . 'The remedies in equity in the courts of the United States are the same, and are to be granted and administered according to the principles, usages and remedies in equity in England at the time our government was established; and where, under the English chancery system, relief by injunction can be given, the same or similar relief may be given by the courts of the United States.' As Mr. Justice Stone said in Matthews v. Rodgers, 284 U. S. 521, 529, 52 S. Ct. 217, 221, 76 L. Ed. 447. 'The equity jurisdiction conferred on inferior courts of the United States by section 11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by section 24 of the Judicial Code (28 U. S. C. A. § 41), is that of the English court of chancery at the time of the separation of the two countries.'

These principles have long been settled by the Supreme Court. See *Irvine* v. *Marshall*, 20 How. 564, 565 (1857); *Fitch* v. *Creighton*, 24 How. 162, 163 (1860); *Waterman* v. *Canal Louisiana Bank Co.*, 215 U. S. 43, 44 (1909); *Sprague* v. *Ticonic Bank*, 307 U. S. 164, 167 (1939).

The power to afford the remedies available in equity, thus given to federal courts by force of this general provision giving them jurisdiction over suits in equity, is not crystallized in the precise form administered by the English Court of Chancery in 1789 but remains alive and adaptable to the necessities of a given case. See the recent decision of the Supreme Court in *Sprague* v. *Ticonic Bank*, 307 U. S. 164 (1939), where a remedy was afforded as

"part of the historic equity jurisdiction of the federal courts," and it was held that plaintiff was not confined to the precise form of this remedy as previously recognized.

Rule 65 of the Rules of Civil Procedure, which is taken from Title 28 U. S. C. A., § 381, prescribes certain conditions regulating the issuance of injunctions.

Not only is the power to issue injunctions in aid of a party's suit in equity conferred upon the federal courts by virtue of the general language of the Judiciary Act conferring jurisdiction upon them, but Section 4 of the Sherman Act, in creating the special jurisdiction for suits in equity to "prevent and restrain violations" of the antitrust laws, expressly provides that the District Courts shall in such cases have the power to issue preliminary injunctions. This provision of the statute is the following:

> . . . Pending such petition and before final decree, the Court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Again, in addition to the general powers of federal courts sitting as courts of equity, special provision is made by statute to enable such courts to exercise that jurisdiction. Title 28 U. S. C. A., § 377 provides as follows:

> . . . The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (R. S. § 716; Mar. 3, 1911, c. 231, § 262, 36 Stat. 1162.)

This statute and its effect have been characterized by the Circuit Court of Appeals in this Circuit in the case of *In re Nine North Church Street*, 82 F. (2d) 186, 188 (C. C. A. 2, 1936), as:

> An indefinite power to enjoin in aid of the court's jurisdiction is granted by Section 262 of the Judicial Code (28 U. S. C. A. Sec. 377).

As part of the relief prayed in the complaint here filed by the United States, the Government asks that defendants be perpetually enjoined from carrying out any agreements that prevent sales of diamonds by any of them for import into the United States, and that defendants be enjoined from entering into any agreement with any other defendant having the purpose or effect of limiting or restricting import of diamonds into the United States or of enhancing or influencing the price of diamonds in the United States. The complaint alleges that at the present time all defendants who operate diamond mines maintain agreements requiring them to sell all their diamonds exclusively through a single selling agency, Diamond Trading Company. To prevent continued restraint and monopolization of the foreign trade and commerce of the United States in gem and industrial diamonds, the final decree in this case, upon proof of the charges made by the complaint, will require defendants to cancel their existing exclusive selling agreements insofar as they prevent sales of diamonds direct from the producers to purchasers for import into the United States. Rule 70 of the Rules of Civil Procedure provides, *inter alia*, as follows:

> If a judgment directs a party . . . to perform any . . . specific act and the party fails to comply within the time specified, . . . on application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment.

The injunction sought by the present application would protect and preserve the power of this Court to afford to the United States the remedy upon final decree which Rule

70 affords. Against the foreign corporate defendants the Court's own process can command no other remedy. Without issuance of the temporary injunction, the remedy will be frustrated.

B. A court of equity will issue a preliminary injunction to prevent a party from defeating its jurisdiction.

It is fundamental that a court will exercise its inherent powers to protect and preserve its jurisdiction. The general proposition is stated in 21 C. J. S. Courts, Sec. 86, in these terms:

> A court has inherent power to maintain its jurisdiction and render it effective in behalf of litigants.

Issuance of an injunction to prevent a defendant from frustrating the jurisdiction of this Court sitting in equity was granted in the case of *Fisk* v. *Union Pacific Railroad Co.*, Fed. Cas. No. 4830 (1873). There the complainant filed a bill in equity against the Union Pacific Railroad Company and Credit Mobilier of America, a Pennsylvania corporation. Credit Mobilier commenced proceedings in a state court for the purpose of effecting its dissolution. The plaintiff prayed for an injunction to restrain it from any further attempts thus to evade the jurisdiction of the court. Blatchford, D. J., said:

> It cannot be permitted that, after jurisdiction in this suit, over this corporation has been acquired by this court, the corporation should be suffered to take steps to evade such jurisdiction by procuring its own dissolution.

The Supreme Court in *Kline* v. *Burke Constr. Co.*, 260 U.S. 228 (1922) restated the rule that the extraordinary writ statute Title 28 U.S.C.A., Section 377, authorized issuance of injunctions by a court of equity to protect its jurisdiction. The court declared well settled a striking in-

stance of the extent to which a court will go for this purpose. The plaintiff sought an injunction against proceedings in a state court. In terms this relief appears to be expressly prohibited by Section 379 of Title 28 of the U. S. Code, which provides that:

> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state.

The Supreme Court stated that, nevertheless, the established rule is:

> But this section is to be construed in connection with §262, which authorizes the United States courts "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." See Julian v. Central Trust Co., 193 U. S. 93, 112; Lanning v. Osborne, 79 Fed. 657, 662. It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court.

Grant of a preliminary injunction against state proceedings to preserve a federal court's jurisdiction is also illustrated in *Looney* v. *Eastern Texas Railroad Company*, 247 U. S. 214 (1918). This was a suit by railroads to enjoin the Attorney General of Texas from instituting suits against them for complying with an order of the Interstate Commerce Commission. The plaintiff alleged that "it is necessary to protect the jurisdiction of this Court already acquired over the subject matter, and in order to afford these plaintiffs [the carriers] full and complete relief." A temporary injunction was awarded. The Attorney General of the State appealed to the Supreme Court. A motion to dismiss the appeal was granted. The court said (p. 221):

> The use of the writ of injunction by federal courts first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice.

Issuance of preliminary injunctions of this nature for the purpose of protecting the Court's jurisdiction was characterized in *Boynton* v. *Moffat Tunnel Improvement District*, 57 F. (2d) 772 (C. C. A. 10, 1932), c.d., 287 U. S. 620, as follows:

> It is correctly argued that a court has inherent power to make such interlocutory orders as may be necessary to protect its jurisdiction, and to make certain that its eventual decree may not be ineffective.

Removal of property from the jurisdiction, where that would have defeated the jurisdiction of the court, was specifically enjoined in this state in the case of *Ward* v. *Arrendondo*, Hopkins (N. Y.) 213 (1824). Plaintiff there brought suit in the New York court for specific performance of a contract to convey land to the plaintiff. The land was located in Florida. The vendor was a Spanish subject then in Spain. When the suit was brought, a deed of the land by the vendor to the plaintiff was within the jurisdiction in the hands of an agent of the vendor. Plaintiff prayed an injunction against return of the deed to the vendor. The court held that the bill was in effect "one to enforce a specific performance of the contract, by laying hold of the deed which is within the jurisdiction of the court," and held that a preliminary injunction should be granted as prayed pending the trial on the merits.

This particular remedy of injunction against removal of property subject to the court's jurisdiction was held in *Iron City Savings Bank* v. *Isaacsen*, 158 Va. 609, 164

S. E. 520 (1932), to be properly granted for the purpose of giving the defendant opportunity to perfect personal jurisdiction over the defendant, and in order to protect the plaintiff against frustration of his remedy prior to acquisition of personal jurisdiction.

In creditors' suits seeking to set aside fraudulent voluntary conveyances, injunctions against removal of the property from the jurisdiction or other disposal of the property are granted as a matter of course. A simple contract creditor cannot always obtain this relief *In re North Church Street, Supra*, but that is because a court of equity has no jurisdiction to entertain a suit to collect a simple contract debt. In the case here at bar, the Court has jurisdiction in equity over the cause by force of Section 4 of the Sherman Act.

For injunctive relief to prevent defendants' destruction of the plaintiff's remedy by removal of the property from the jurisdiction or by otherwise disposing of it, see *Cobb* v. *Interstate Mortgage Corporation*, 20 F. (2d) 786 (C. C. A. 4, 1927); *Smith* v. *Bradlee*, 37 N. Y. S. (2) 512 (1942); *Allan* v. *Moline Plow Co.*, 14 F. (2d) 192 (C. C. A. 8, 1926).

On this application, the United States does not seek an injunction in order to obtain jurisdiction as in *Davis* v. *Foreign Bickford Co.*, 139 F. (2d) 624 (C. C. A. 8, 1944), but seeks to prevent frustration of the effective jurisdiction which, *prima facie* upon the basis of the allegations in the verified complaint and the facts appearing in the supporting affidavits, the court has obtained *in personam* over the foreign corporate defendants.

C. It is settled doctrine that in cases cognizable by courts of equity injunctions will be granted to maintain the status quo until the court has had an opportunity to decide the controversy, where, unless the injunction issues, the plaintiff will suffer irreparable injury and issuance of the injunction will not unduly harm the defendant.

Where plaintiffs in causes cognizable in equity seek a preliminary injunction, the balance of convenience between

the parties is the established test of the right to issuance of the injunction. In *Ohio Oil Company* v. *Conway*, 279 U. S. 813 (1929), plaintiff sued to enjoin collection of Louisiana taxes upon a challenge of constitutionality of the tax imposed. Plaintiff applied for a preliminary injunction upon the ground that collection of the tax by the Louisiana authorities during the pendency of the suit would injure the plaintiff irreparably, since under the Louisiana law there was no way to recover the taxes collected or paid under protest. The Supreme Court held that it was an abuse of discretion by the District Court to deny the application for the preliminary injunction. The test determining the propriety of issuing the preliminary injunction was thus defined by the court:

> Where the questions presented by an application for an interlocutory injunction are grave and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.

It was held in *Colorado Eastern R. R. Co.* v. *Eastern B. & W. R. Co.*, 141 Fed. 898 (C. C. A. 8, 1905) that the right to a preliminary injunction should be determined by the balance of convenience test, which was expressed in these terms:

> The granting of a temporary injunction does not determine the rights of the parties. The court need be satisfied no further than of a probable right and a probable danger, and that such right may be defeated without the interposition of a restraining

order, and that the granting of such order will probably be attended with less injury to the respondent than to the complainant.

Other cases supporting this doctrine are: *Elliott Addressing Machine Co.* v. *Addressing Typewriter Stencil Corporation*, 31 F. (2d) 282 (C. C. A. 2, 1929), citing with approval the *Colorado Eastern* case, *supra; Sinclair Refining Co.* v. *Midland Oil Co.*, 55 F. (2d) 42, 45 (C. C. A. 4, 1932); *Sanitary Reduction Works* v. *California Reduction Co.*, 94 Fed. 693, 696-7 (C. C. N. D. Cal. 1899); *Blount* v. *Societe Anomye du Filtre*, 53 Fed. 98 (C. C. A. 6, 1892); *City of Newton* v. *Lewis*, 79 Fed. 715 (C. C. A. 8, 1897).

Further decisions in which preliminary injunctions have issued to preserve the status quo in order to protect the plaintiff against irreparable injury and utter loss of remedy include the following:

Hoy v. *Altoona Midway Oil Co.*, 136 Fed. 483 (C. C. D. Del., 1905);

Georgia v. *Brailsford*, 2 Dal. 402 (1792);

Western Union Telegraph Co. v. *Industrial Commission*, 24 Fed. Supp. 370, 374 (D. C. D. Minn., 1930);

Denver & R. G. R. Co. v. *United States*, 124 Fed. 156 (C. C. A. 8, 1903);

Harriman v. *Northern Securities Co.*, 132 Fed. 464 (C. C. D. N. J. 1904);

Hadden v. *Dooley*, 74 Fed. 429 (C. C. A. 2, 1896);

American Smelting & Refining Co. v. *Bunker Hill & Sullivan Mining and Concentrating Co.*, 248 Fed. 172 (D. C. D. Ore., 1918).

As pointed out, the net effect of the injunction sought on this application would be merely to assure that the busi-

ness of defendants would continue to be conducted during the pendency of this suit in the same manner as it was carried on before the complaint was filed. The Government seeks only the aid of this Court to prevent the defendants from bringing about a change in their usual course of business for the deliberate purpose of withdrawing themselves and their assets from the effective jurisdiction of the court. At the present time, by virtue of the presence in this jurisdiction of assets customarily maintained by the defendants in this state in the regular conduct of their business, and under the present protection afforded the Government by the preliminary restraining order, the Court possess the power to make its decision of this controversy effective. With the dissolution of the restraining order and refusal of the injunction, the Court would surrender that power. The injury to the plaintiff is manifest. The defendants may defy the order of this Court with impunity and may continue the practices by which they have violated the laws of this land. On the other hand, grant of the injunction would not only impose no change in the course of defendant's business at this stage of the proceedings, not only would it throw no loss whatsoever upon them at this time, but defendants have it in their power to afford, with insignificant cost or burden to themselves, all the assurance and protection to the Government that the application for the injunction seeks to obtain. Defendants can readily afford this assurance either by giving bond to render themselves amenable to the process of this Court or by moving within this jurisdiction and maintaining here the stockpile of industrial diamonds which they now maintain in Canada for supply to American war industry.

We submit that the application for an injunction in this case meets to the fullest the test of balance of interests, and that in accordance with the authorities establishing the right to an injunction on this basis the injunction should issue as prayed.

D. The application for this injunction asks the court to exercise the equivalent of its intrinsic power as a court of equity to issue the writ of ne exeat, and exercise of this power against a foreign corporation is not subject to the limitations upon issuance of a writ against an individual.

Relief against a foreign corporation in a suit invoking the court's special statutory jurisdiction under the Sherman Act to enjoin the corporation's violation of the antitrust laws presents special problems. Effective remedy is not provided by the usual means for collection of claims against foreign corporations. There is no assured, effective remedy by ordinary process even though the Court has *in personam* jurisdiction over the corporate defendant. The foreign corporation may flee the effective jurisdiction of the Court by withdrawal of its assets. The statutory remedies of attachment have been drawn largely for the satisfaction of pecuniary claims. A judgment in a suit under the Sherman Act cannot with certainty be regarded as having that transitory character which renders other judgments based upon personal jurisdiction enforceable in foreign jurisdictions.

Since earliest times, in any suit properly cognizable in equity, where the personal presence of an individual defendant within the jurisdiction was necessary in order for the Court to afford effective relief, courts of equity have possessed and exercised the power to prevent the defendant's departure from the jurisdiction by issuance of the writ *ne exeat regno*. This power was not statutory in its origin but developed historically in chancery, and passed to and is possessed by the United States District Courts by virtue of their general investiture with the powers of a court of equity. We submit that since equity will grant this relief against an individual defendant, it should by use of its power to enjoin, afford the same relief against a foreign corporation. Particularly in the special exigencies of enforcement of a final decree, under Section 4 of the Sherman Act against a foreign corporation, the Court should by use

of its injunctive process fulfill the same need against a corporation as historically the Court always has fulfilled against individuals by the writ *ne exeat*.

Grant of an injunction prohibiting removal of assets by foreign corporate defendants, for the like purpose and to afford the like remedy as in the issuance of the writ *ne exeat*, is not subject to the objections founded upon abolition of imprisonment for indebtedness and the natural hostility to personal arrest or interference with personal movement. It is particularly free of these objections where, as in the facts of this case, the inconvenience inflicted is trivial compared with the injury to plaintiff that it avoids.

The nature and office of the writ of *ne exeat* were characterized by this Court in *In re Lipke et al*, 98 Fed. 971 (D. C., S. D. N. Y., 1900) as follows:

> . . . The writ of ne exeat is one of the orders or writs in familiar use in equity against one who "designing to avoid the justice and equity of the court, is about to go beyond sea, so that the duty will be endangered if he goes." 1 Wyatt, Prac. Reg. 289; 2 Story, Eq. Jur. p. 800. § 1470, note; 3 Daniell, Ch. Prac. (2d Am. Ed.) p. 1925.

See to like effect, *Murphy* v. *Patis*, 16 F. (2d) 515 (C. A., D. C., 1926); and *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208 (1932).

In *Bushnell* v. *Bushnell*, 15 Barb. (N. Y.) 399, (1853), the court pointed out that issuance of this writ or exercise of the equivalent power must be afforded by a court of equity where necessary to prevent frustration of it's jurisdiction. Upon this proposition the court said:

> . . . At what particular period this writ was introduced into the practice of the English court of chancery, and to what particular purposes it was originally applied, may be involved in some obscurity; but none will deny that the power to issue and apply

it to those uses sanctioned by immemorial practice is an essential and indispensable attribute of the equity courts. Without its aid or that of some other equivalent process, the equitable jurisdiction vested in this court by the constitution must fail, and its functions in regard to many subjects of equitable cognizance become useless; for decrees and orders are senseless and unmeaning ceremonies when the tribunal which makes them is shorn of the power to carry them into execution. Upon the facts before the court in this action the statute authorizes a decree for a separation from bed and board forever, or for a limited time, together with such order and decree for the suitable support and maintenance of the wife by the husband, or out of his property, as the nature of the case renders suitable and proper.' But if the husband who owes and has the ability to make this just reparation to his injured wife, cannot be restrained within the jurisdiction of the court during the pendency of the litigation; if he may withdraw himself to the distant shores of the Pacific, there to enjoy his property, and his ample salary, at his leisure, while she remains to labor as a menial for subsistence, the provisions of the statute are in respect to her a mass of unmeaning words, and any decree which the court might make will be a barren and fruitless proceeding.

See the like relief granted under the New York statute in *Sturges* v. *Sturges*, 186 N. Y. S. 693 (1920).

The need which the writ of *ne exeat* answered and for which it was developed by courts of equity and granted by them is the same as the need for which application is made for this injunction. That need was characterized in *Lewis* v. *Shainwald*, 48 Fed. 492, 499 (C. C. D. Calif. 1881) in these terms:

> . . . The very object of this provisional remedy is to secure the presence of the party in order that the judgment may be executed,—in order that he may not be able to evade it.

Furthermore, the need served by this writ was regularly provided for in practice in the same manner as could be met upon this application by the defendants giving bond to make themselves amenable to the process of this Court. Thus, in *Mitchell v. Bunch*, 2 Paige 606, 619 (1831) it was said:

> Although in form it [the writ ne exeat] prohibits the defendant from going out of the jurisdiction of the court, yet it is a matter of course to discharge the writ, upon the party's giving security to answer the complainant's bill, where a discovery is necessary, and to abide such order and decree as may be made in the cause, and to render himself amenable to the process of the court, which may be issued to enforce the performance of the decree.

The writ of *ne exeat* issued where the plaintiff's bill sought to require performance by defendant of specific acts as well as where the proceeding was for enforcement of a pecuniary claim. Thus, it is said in Gibson's Suits in Chancery (1907) Section 865 as follows:

> It would seem that a ne exeat is a writ necessary for the purposes of justice when the defendant, by leaving the state, can defeat the power of the court to grant effectual relief, or evade the relief granted; especially when the relief consists in compelling the defendant (1) to execute to the complainant a deed for land, or other property, situate in another state, or * * * (4) to do some other act which the court could not effectually do by the direct and inherent operation of its own decree. The object of the writ is to enable the court to act upon the person of the defendant in such cases. 1 Barb. Ch. P. 647, 651.

652; 2 Dan. Ch. Pr. 1698, note; 2 Sto. Eq. Jur. §§ 1471, 1472, note.

Thus in *Hays* v. *Willie*, 11 Abb. Pr. (N. S.) 167 (1871), reversed on other grounds, 4 Daly 259 (1872), it was held in this state that a writ of *ne exeat* should issue against defendant threatening to appear as a theatrical performer in Boston contrary to a contract with plaintiff, for the violation of which plaintiff had brought suit praying an injunction. The court said:

> The return of *ne exeat* being issued in aid of the injunction, and being absolutely necessary to carry the order of the court into effect, the order to set it aside must be denied.

Furthermore, it was decided in England that in a case where, if the defendant departed the realm for other countries, he might lawfully in these countries injure the plaintiff in a manner which he could be prohibited from doing in England, the writ should issue for the very purpose of preventing this frustration of the plaintiff's remedy. *Mackintosh* v. *Ogilvie*, Dic. 119, 21 Repr. 213 (1747). In this case, Lord Hardwicke held as follows:

> Commissions of Bankruptcy equalize all creditors in England; and as the defendant is resident in this country, he is subject to the laws thereof, and I therefore will not permit any person to pass into Holland, or Scotland, where arrestments are allowed, to gain a total satisfaction of their debt in prejudice of the other creditors. For if he goes out of England, and out of reach of the process of this court, his agents may recover the debt, and he can never be accountable here; therefore let the writ continue.

In this state Chancellor Kent in an early decision acted upon the proposition that the exercise by a court of equity of the power to issue a writ of *ne exeat* was not limited to

precise rules but should be exercised where necessary to prevent a failure of justice. *Porter v. Spencer*, 2 John. Ch. 169 (1816). That case arose upon plaintiff's prayer for issuance of a writ in aid of proceedings at law seeking to enforce a purely legal demand. It is, of course, the usual doctrine that the writ issues only in cases cognizable in equity and not in matters actionable only in law. However, in this case, the defendant, who had already been arrested at law and had given bail, was about to leave the state leaving no property behind, and furthermore his bail, who was the plaintiff's father, had also disposed of his property in the state and was about to depart. The Chancellor held as follows:

> I place my interference on the necessity of the case. From the facts charged and sworn to, it appears to me that the remedy in the suit pending at law would be absolutely defeated without the interposition of this Court. The books assume and admit principles that will justify the allowance of the writ under the peculiar circumstances of the present case. The remedy sought is indispensable to prevent a failure of justice, and this creates a marked difference between this and the ordinary cases. I should think it would reflect discredit on the administration of justice, if the plaintiff could find no relief from the impending mischief arising from a failure of the remedy at law, by the immediate removal of the defendant and his bail. I have no option or discretion to refuse the writ, when a case is brought within the established rules of the Court.

The power exercised by equity in granting this relief is not atrophied or archaic but remains alive and adaptable to the necessities of the case. This was the ground of decision in the case of *Palmer v. Palmer*, 84 N. J. Eq. 350 (1915), decided in a jurisdiction still practicing in accordance with the principles and jurisdiction of the Courts of Chancery in

England (See *Ettelson* v. *Metropolitan Life Ins. Co.*, 42 F. S. 488, 491 (D. N. J., 1941)). The decision was thus expressed:

> Assuming that there is no precedent for the issuance of a ne exeat to keep a parent within this state to answer the exigencies of an order for access to a minor child by the other parent, no obstacle to the jurisdiction of this court to order the issuance of the writ is presented, for chancery will make a precedent to fit a case, novel in incident, which comes within some head of equity jurisprudence. *Earle* v. *American Sugar Refining Co.*, 74 N. J. Eq. 751 (at p. 761), and cases cited.

We submit that the decision of the United States Supreme Court in *Sprague* v. *Ticonic Bank*, *supra*, sanctioning a novel proceeding seeking the same practical result as afforded by historic remedies in equity, fully sustains the right to issuance of an injunction here as the equivalent of the historic writ *ne exeat* to meet the necessities of the case and to prevent a failure of justice. It is significant in this connection, we submit, that issuance of the writ *ne exeat* was in *Lewis* v. *Shainwald*, *supra*, expressly grounded upon the authority extended by Title 28 U.S.C.A., Section 377 to issue writs in aid of the court's jurisdiction. The court said:

> By Rev. St. § 716, it is provided that "the supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The writ of *ne exeat* is one of the writs necessary to the exercise of the present jurisdiction of the district court. * * * The authority of the district court to issue this writ is therefore unquestionable.

Grant of an injunction in this case restraining the foreign corporate defendants from withdrawing their assets from the United States or from depleting them is not subject to the limitations upon issuance of a writ *ne exeat*.

The only statutory limitation upon the writ, Title 28, U. S. C. A. § 376, is that the cause be cognizable in equity and that the defendant be shown to be designing quickly to depart from the United States. Here the court has cognizance of the cause in equity by force of § 4 of the Sherman Act. As to the intent to depart, the reality of the situation and the supporting affidavits present the equivalent of individual departure in the imminent withdrawal of corporate funds.

The rule of common law that *ne exeat* issued only in assertion of claims for amounts certain, or that could be made certain, *Ginsberg & Sons* v. *Popkin, supra* has been departed from where the object of the suit is to compel performance of specific acts and where the writ was necessary to prevent a failure of justice, as in *Hays* v. *Willio* and *Palmer* v. *Palmer, supra*.

These restrictions upon the remedy of *ne exeat*, and the principles arising from abolition of imprisonment for debt do not apply to the application for an injunction in this case. The injunction is not a writ of *ne exeat*. It does not arrest or molest any individual. It answers the need against the foreign corporate defendant which is met by *ne exeat* against the individual without inflicting personal seizure or confinement. Equity has historically exercised the power to prevent an individual's departure from the jurisdiction by the writ of ne exeat. The precise rules for application of that power against individuals have no application here. The court exercises through the writ *ne exeat* the power to prevent flight in order to protect and preserve jurisdiction. That same power should be exercised for the same purpose of protecting and preserving the effective jurisdiction of the court in this case and the injunction should issue as prayed.

Conclusion

We therefore submit that the facts of this case, the court's statutory authority, and the well-settled rule entitling complainant to an injunction in any cause in equity where, as here, it is necessary to prevent defeat of the court's jurisdiction and frustration of the complainant's remedy, as well as the time honored power of a court of equity to prevent a failure of justice through flight of the defendant during the pendency of the proceedings, fully warrant the issuance of the temporary injunction here applied for. Defendants will suffer insignificant inconvenience from this injunction as compared with the injury to the Government if it is denied. If the injunction should be denied, the foreign corporate defendants may flaunt the laws of this land and the statutory jurisdiction of this Court with impunity.

The Government has filed this suit to protect its citizens from the oppressive conduct of this combination of foreign corporations. We believe that unless this temporary injunction asked for is granted, the combination will be perpetuated. The complaint alleges arbitrary and unconscionable treatment of the people of this country by this combination. If the Government should find itself unable to protect itself and its citizens, we can only conjecture just what further indignities the cupidity of this combination may subject us to. The court in order to perform its functions and do justice between the parties, must maintain its ability to enforce its decrees. Well settled principles of equity require preservation of the status quo so as to avoid irreparable injury to the complainant.

For these reasons, we submit that the application for a temporary injunction should be granted.

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